

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

SUSAN MALESKY,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

) Case No. SUSP-04-0028

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on March 3, 2005.

1.2 **Appearances.** Appellant Susan Malesky was present and was represented by Rick Polintan of the Service Employees International Union, Local 1199 NW. Janetta Sheehan, Assistant Attorney General, represented Respondent Department of Social and Health Services, Western State Hospital.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a seven-day suspension for neglect of duty, gross misconduct, and willful violation of the published employing agency or Department of Personnel rules or regulations for verbal abuse of staff and patients.

II. FINDINGS OF FACT

2.1 Appellant is a Registered Nurse (RN) 3 and permanent employee for Respondent Department of Social and Health Services. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on May 14, 2004.

2.2 Appellant began working at Western State Hospital (WSH) on August 1, 1991, and has been a supervisor at WSH since May 1999. Appellant's Employee Development and Performance Plan evaluations have generally indicated good performance; however, Appellant's supervisors have verbally counseled her regarding outbursts toward staff.

2.3 By letter dated March 29, 2004, Dr. Andrew J. Phillips, Chief Executive Officer, notified Appellant of her seven-day suspension for neglect of duty, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Dr. Phillips specifically alleged that on January 28, 2004, Appellant verbally abused staff and patients by shouting at RN 2 Marisol Tan in an angry tone, repeatedly yelling, "this was [sic] bullshit," in the presence of other staff and patients.

2.4 DSHS has adopted Policy 6.04, Standards of Ethical Conduct for Employees, which states in part, that employees shall create a working environment "free from intimidation, retaliation, hostility, or unreasonable interference with an individual's work performance." The policy also states that employees shall "[i]nteract with co-workers with respect, concern, courtesy, and responsiveness."

1 2.5 Western State Hospital has adopted Policy 3.4.4, Patient Abuse. The policy defines
2 psychological patient abuse as “[a]ny communication or interaction with a patient that is patently
3 anti-therapeutic, dehumanizing, or that places the patient under excessive duress.” Further,
4 misconduct abuse of patients is defined as “[a]ny staff behavior that does not conform to prevailing
5 DSHS standards and that results in any form of patient abuse.”

6
7 2.6 On the date of Appellant’s alleged misconduct, Appellant had the responsibility of
8 supervising six wards and had supervisory authority over Ms. Tan. Appellant called Ms. Tan, who
9 was working on Ward C-9, and requested that she pull Mental Health Technician (MHT) 1 “Tony”
10 from that ward and send him to Ward C-5. Appellant specifically requested Tony because he was a
11 large male, and she thought he would relate well to a disruptive patient. There is a dispute about the
12 exact nature of Appellant’s telephone conversation with Ms. Tan and their subsequent interaction.

13
14 2.7 Appellant testified that she called Ms. Tan three times to request that Tony be sent to Ward
15 C-5, that she explained to Ms. Tan there was an emergent situation on Ward C-5, and that Ms. Tan
16 outwardly refused to send Tony. Appellant stated that Ms. Tan told her Ward C-9 was “high,”
17 meaning patients were volatile, but that Ms. Tan refused to elaborate on specific problems when
18 Appellant asked her to explain the circumstances. Appellant testified she told Ms. Tan she was
19 being insubordinate and Ms. Tan finally agreed to send Tony to Ward C-5 in exchange for another
20 MHT.

21
22 2.8 Appellant then drove MHT Beng Ragasa over to Ward C-9, dropped her off, and continued
23 to another building to pick up some medication for a patient. Appellant was gone approximately 35
24 minutes and upon her return to Ward C-5, she learned that Tony had not yet arrived.

1 2.9 Appellant went to the nurses' station on Ward C-9 to ask Ms. Tan why she had not released
2 Tony. Appellant admitted she was angry and testified that she was firm with Ms. Tan and did raise
3 her voice but claimed she was not disrespectful. Appellant and Ms. Ragasa then left, and Appellant
4 testified that Ms. Ragasa asked her what was going on with Ms. Tan and that she (Appellant)
5 replied, "this is bullshit," as the two of them walked down the hallway.

6
7 2.10 Ms. Tan testified that she only spoke to Appellant once on the phone, that she did not realize
8 Appellant's request to send Tony was due to an emergent situation, and that she was waiting for
9 Appellant to either call her or send another MHT in exchange for Tony. Ms. Tan testified that she
10 waited awhile and then decided to send Tony to lunch prior to sending him to Ward C-5 and that he
11 was still on lunch when Ms. Ragasa arrived to switch places.

12
13 2.11 Ms. Tan testified that Appellant looked very angry as she approached the nurses' station,
14 that she did not understand why Appellant was angry, and that she tried to explain that Tony had
15 been at lunch. Ms. Tan said she could not remember Appellant's exact words but she clearly
16 remembered Appellant repeatedly saying, "this is bullshit." Ms. Tan further stated that MHT
17 Michelle Johnson also heard Appellant use the word "bullshit" a number of times.

18
19 2.12 Ms. Johnson testified she heard loud yelling as she entered Ward C-9 and observed
20 Appellant's angry demeanor toward Ms. Tan. Ms. Johnson noted that patients were moving around
21 in the nearby dining area and dayroom, and she believed patients had witnessed Appellant yelling at
22 Ms. Tan. However, Ms. Johnson only heard Appellant say, "bullshit," in the hallway and away
23 from the patients.

24
25 2.13 We find Appellant, more likely than not, contacted Ms. Tan more than one time prior to
26 arriving on Ward C-9 and that Ms. Tan was uncooperative and reluctant to release Tony to Ward C-

1 5. Appellant's decision to transfer Tony to another ward was within her supervisory authority.
2 However, Appellant expressed her frustration with Ms. Tan in a loud and inappropriate manner. In
3 addition, we find Appellant said the word "bullshit" as she walked down the hallway to leave the
4 ward but did not direct the comment to Ms. Tan or say it in the presence of patients.

5
6 2.14 Nurse Manager RN 4 Pat Jensen reviewed statements by Ms. Tan and Ms. Johnson and
7 forwarded the information to Human Resources Manager Art Stratton. Mr. Stratton met with
8 Appellant and her supervisors for a fact-finding meeting in which Appellant told Mr. Stratton she
9 had been angry with Ms. Tan, raised her voice, and said bullshit. Mr. Stratton considered
10 Appellant's response an admission to the allegations and determined that it was not necessary to
11 obtain Appellant's statement or interview any other employees. Mr. Stratton verbally informed Dr.
12 Phillips, Appellant's appointing authority, of Appellant's alleged misconduct.

13
14 2.15 In determining the level of discipline, Dr. Phillips considered Appellant's role as a
15 supervisor and determined that becoming angry, raising her voice, and using profanity toward staff
16 was a neglect of her duty and constituted gross misconduct. Dr. Phillips also determined
17 Appellant's misconduct violated DSHS's Policy 6.04, Standards of Ethical Conduct for Employees,
18 and Western State Hospital 3.4.4, Patient Abuse, for failing to treat a subordinate employee with
19 respect and dignity in the presence of patients. In addition, Dr. Phillips considered that Appellant
20 had been verbally warned about her unacceptable behavior and concluded this type of
21 unprofessional behavior was not out of character for her.

22 23 **III. ARGUMENTS OF THE PARTIES**

24 3.1 Respondent argues the evidence clearly shows that Appellant yelled at a subordinate staff
25 member and used profanity in the presence of other staff and patients. Respondent further argues
26 that Appellant admitted to being angry and raising her voice. Respondent contends that Appellant

1 has a history of angrily confronting staff in a demeaning manner and that she has been verbally
2 counseled about her unacceptable behavior. Respondent argues that as a supervisor, Appellant is
3 held to a higher standard and is expected to act professionally and in a manner that provides a
4 therapeutic environment for patients.

5
6 3.2 Appellant argues she was frustrated because Ms. Tan was refusing to cooperate with her
7 request to send a male MHT to another ward as needed. Appellant asserts she admitted to being
8 angry, raising her voice at Ms. Tan, and saying “bullshit” in the hallway but contends it was a
9 reaction to Ms. Tan’s blatant insubordination. Appellant denies she directed the comment to
10 anyone and asserts no patients were in the vicinity at the time. Appellant argues that she has not
11 admitted to the allegations of staff or patient abuse. Appellant asserts that her main concern was to
12 ensure the safety of patients and staff and argues she was firm with Ms. Tan but not disrespectful.
13 Appellant further argues her conduct was mitigated due to Ms. Tan’s refusal to work with her.
14 Appellant argues she is a 14-year employee with good evaluations and asserts a seven-day
15 suspension is not appropriate.

16 17 **IV. CONCLUSIONS OF LAW**

18 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.
19

20 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
21 the charges upon which the action was initiated by proving by a preponderance of the credible
22 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
23 sanction was appropriate under the facts and circumstances. WAC 358-30-170; [WAC 251-12-
24 240(1)]; Baker v. Dep’t of Corrections, PAB No. D82-084 (1983).

1 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
2 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
3 of Social & Health Services, PAB No. D86-119 (1987).

4
5 4.4 Respondent has proven by a preponderance of the credible evidence that Appellant
6 neglected her duty as a supervisor when she inappropriately raised her voice to Ms. Tan in front of
7 co-workers and with patients nearby in the dining area and dayroom. Even though Ms. Tan was
8 uncooperative and exhibited insubordinate behavior, Appellant should have modeled professional
9 behavior and addressed her concerns in private. Furthermore, Appellant's use of profanity,
10 although not directed at Ms. Tan or made in the presence of patients, was inappropriate.

11
12 4.5 Willful violation of published employing agency or institution or Personnel Resources
13 Board rules or regulations is established by facts showing the existence and publication of the rules
14 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
15 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

16
17 4.6 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
18 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant
19 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's
20 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

21
22 4.7 Respondent has proven that Appellant violated DSHS's Policy 6.04, Standards of Ethical
23 Conduct for Employees, by failing to address her concerns with Ms. Tan in an appropriate manner.
24 However, there is no evidence Appellant's behavior affected any patients in the area. While
25 Appellant clearly acted unprofessionally, Respondent has not proven that her actions rose to the
26 level of gross misconduct or that she violated WSH's policy on patient abuse.

1
2 4.8 In determining whether a sanction imposed is appropriate, consideration must be given to
3 the facts and circumstances, including the seriousness of the offenses. The penalty should not be
4 disturbed unless it is too severe. The sanction imposed should be sufficient to prevent recurrence,
5 to deter others from similar misconduct, and to maintain the integrity of the program. An action
6 does not necessarily fail if one cause is not sustained unless the entire action depends on the
7 unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

8
9 4.9 Under the circumstances presented, we conclude that a seven-day suspension is too severe,
10 and a three-day suspension should be adequate to impress upon Appellant the seriousness of her
11 unprofessional conduct.

12
13 **V. ORDER**

14 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Susan Malesky is modified to
15 a three-day suspension.

16
17 DATED this _____ day of _____, 2005.

18
19 WASHINGTON STATE PERSONNEL APPEALS BOARD

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21
22 _____
Busse Nutley, Vice Chair

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24 _____
Gerald L. Morgen, Member